IN THE

Supreme Court of the United States

October Term, 1978

No. 78-289

FEDERAL DEPOSIT INSURANCE CORPORATION,
Petitioner,

vs.

FIRST EMPIRE BANK-NEW YORK, *et al.*

BRIEF IN OPPOSITION.

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BRIEF IN OPPOSITION.

Respondents, First Empire Bank-New York and Societe Generale, in response to the petition for certiorari filed herein, urge the Court to deny the same.

Question Presented.

Did the Court of Appeals err in holding that the Federal Deposit Insurance Corporation as Receiver of United States National Bank violated the ratable treatment provisions of the National Bank Act (12 U.S.C. §§91 and 194) when it distributed the assets of the estate of United States National Bank ("USNB") to most general, unsecured creditors of the bank in amounts equal to 100% of their claims but failed to provide for the payment of the claims of the holders of USNB's standby letters of credit?

Statutes Involved.

The following statutes are involved in this case: 12 U.S.C. §§91, 192 and 194 (all sections of the National Bank Act) and 12 U.S.C. §§1821 and 1823 (provisions of the Federal Deposit Insurance Act). The relevant portions of these statutes are set out in Appendix C to the petition, except for §192 which is reproduced *infra* in Appendix A to this brief.

Statement of the Case.

1. Until October 18, 1973, USNB was a national banking association with its principal place of business in San Diego, California. On that date the Comptroller of the Currency declared USNB to be insolvent and appointed the Federal Deposit Insurance Corporation receiver ("Receiver"). *See* 12 U.S.C. §1821(c). By the terms of a predrafted purchase and assumption agreement, the Receiver offered for sale almost all of the deposit liabilities of USNB and most of its assets, except loans to companies and individuals connected with C. Arnholt Smith (the "Designated Group"); and, to make up the difference between the liabilities transferred and the assets sold, the Receiver offered to supply a balancing amount of cash, which it would borrow from the Federal Deposit Insurance Corporation ("FDIC") by pledging the assets of USNB retained in the receivership estate. (Pet 9a.)[1]

Upon being advised of the acceptance by the Receiver of the bid of Crocker National Bank ("Crocker")

[1]We note that in the courts below the FDIC and the FDIC as Receiver of USNB appeared as defendants-appellees and cross-appellants. The former appears alone as petitioner in this Court.

and the signing of the required documents, attorneys for the Receiver petitioned the United States District Court for the Southern District of California for court approval of the proposed sale and pledge of USNB's assets. *See* 12 U.S.C. §192. The court granted the required approval. *In re the Liquidation of United States National Bank,* No. 73-445-N.

At the time of its closing, USNB showed on its books an amount in excess of $100 million on account of letters of credit it had issued. Some of these were commercial letters of credit secured by title documents of goods. Such letters of credit were required, under the purchase and assumption agreement, to be assumed by Crocker. Approximately $91 million in letters of credit appeared on the bank's records to have been issued in connection with transactions involving as account parties one or another Smith-related enterprise or affiliated person included in the Designated Group. These standby letters of credit were not assumed by Crocker but were retained by the Receiver. (Pet. 9a, 35a-36a.) However, other standby letters of credit, in which the account parties were not members of the Designated Group, were assumed by Crocker under the purchase and assumption agreement. (Pet. 19a, 36a.)

As a result of the purchase and assumption transaction, except for the holders of the $91 million in unassumed standby letters of credit, all creditors of USNB as of October 18, 1973, who were not a part of the Designated Group, had their USNB obligations satisfied in full via Crocker's assumption of such obliga-

tions at full value (100 cents on the dollar plus agreed upon interest).[2]

Respondents, adjudicated "creditors of USNB" (Pet. 2a), hold five USNB letters of credit in face amount of $11.5 million. Those letters of credit were not transferred to Crocker for assumption on October 18, 1973, but were retained in the USNB receivership. They have never been paid. In the petition the FDIC admits that respondents' USNB letters of credit were rendered "worthless" by its conduct. (Pet. 5.) Yet all other general, unsecured creditors of USNB have already received a 100% dividend plus interest.

[2]Petitioner never alleged that respondents were in any sense involved in Mr. Smith's fraudulent conduct, thereby warranting special treatment similar to that accorded members of the Designated Group. *See* 12 U.S.C. §1813(m); 12 C.F.R. §305.1. Now, however, without any reference to the pleadings or evidence of record to support the charges, petitioner seems to imply that respondents were in league with Mr. Smith and his cohorts and made "personal" loans to them which facilitated their unlawful conduct. (*See* Pet. 3, 5, 9, 10, 11.) The charges are outrageous and, more importantly, totally false. In this respect, and in many others, the petition is simply at odds with the undisputed facts of record.

Respondents (and the other banks similarly situated) are respected domestic and international bankers who engaged in normal banking transactions with USNB and its customers at a time in the early part of this decade when USNB was one of the largest American banks. The loans at issue were all to operating, corporate entities, to wit, Westward Realty Co., Los Altos Management Co., Roberts Farms, Inc. and Tri-County Ranches, Inc. (Pet. 36a-39a), all of which are still extant. The loaning of funds to the corporate customer of a major American bank in return for the customer's note and the bank's standby letter of credit was then, and is now, normal banking practice. *See generally* Hearings on S. 2347 (Regulation of Standby Letters of Credit), Senate Committee on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess. (1976), especially, 5-11, 238-50. *See also FDIC Regulations,* 12 C.F.R., §§337.2, 337.10 and 337.11; *Comptroller of the Currency Interpretative Rulings and Regulations,* 12 C.F.R. §§7.1160, 7.1550, 7,7361, 11.7, 18.2 and 18.3; *Federal Reserve System Regulations,* 12 C.F.R., §§206.7(c)(9)(viii) and 208.8(c) and (d).

2. Petitioner thus devised and implemented a non-ratable distribution plan in which similarly situated creditors of USNB were treated differently—most received a 100% dividend, the rest got nothing. Petitioner does not deny that in the USNB transaction it discriminated among similarly situated creditors of USNB and that the Receiver distributed the bank's assets in a non-ratable manner; it admits it. The *exclusive* justification for the Receiver's conduct is the contention that 12 U.S.C. §1823(e) authorizes non-ratable treatment of similarly situated creditors of an insolvent national bank in connection with a purchase and assumption transaction. (Pet. 12-20.) In rejecting petitioner's contention, the Ninth Circuit Court of Appeals unanimously held that §1823(e), by its own terms, is *not* a "broad" grant of Congressional authority to the FDIC to "arrange purchase and assumption transactions 'upon such terms and conditions as it may determine.'" (Pet. 12, 16.) Rather, it held that the statute does no more than authorize "the FDIC in its corporate capacity," not as receiver, to arrange for *loans or sales* upon such "terms and conditions . . . that would, in the judgment of the board of directors [of FDIC], qualify the agreement as action that would 'reduce the risk of loss or avert a threatened loss to the Corporation.'" (Pet. 22a-23a.) It correctly concluded that nothing in the statutory language or its legislative history "excused [the Receiver] from behaving like a receiver . . .". (Pet. 23a.)

Such behavior, the court below held, meant compliance with 12 U.S.C. §§91 and 194 (provisions of the National Bank Act). (Pet. 23a.) Noting that those statutes embody a Congressional "policy of equitable

and ratable payment of creditors" (Pet. 24a), the court observed that:

> To accede to the FDIC's contentions would seriously undermine the policy firmly set forth in §91 that some creditors are not to be preferred over others, and of §194 that when distributions are made they shall be ratably made. Under its interpretation of the statutes, the FDIC could (subject only to its concession that it must act "reasonably," but without any apparent applicable standard), pick and choose which creditors should be preferred, or permit the acquiring bank to pick and choose. [Pet. 24a.]

In response to petitioner's argument that §194 is only applicable to the distribution of the receivership assets remaining after a purchase and assumption transaction has been effected (*see* Pet. 14), the court below wrote:

> We cannot agree. It is the proceeds of a purchase of receivership assets that must be ratably distributed under §194. Here receivership assets (including the cash borrowed from the Corporation) were sold in exchange for Crocker's assumption of debts. That assumption, then, as proceeds of the sale, constitutes a distribution of assets which must give ratable recognition to the rights of creditors of the receivership. *Ex parte Moore,* 6 F. 2d 905, 909 (E.D.S.C. 1925); *see Gockstetter v. Williams,* 9 F. 2d 354 (9th Cir. 1925). [Pet. 21a n.3.]

REASONS FOR DENYING THE WRIT.

1. The decision below is in keeping with the long-established, universally accepted principle that similarly situated creditors of bankrupt or insolvent debtors should be treated equally. This Court has repeatedly emphasized that "one of the objects of the national banking system is to secure, in the event of insolvency, a just and equal distribution of the assets of national banks among unsecured creditors. . . ." *Mechanics Universal Joint Co. v. Culhane,* 299 U.S. 51, 55 (1936). *See also First National Bank v. Colby,* 21 Wall. (88 U.S.) 609 (1875).[3] The Court's dedication to this principle of "just and equal distribution" is so strong that it has consistently struck down federal and state statutes that purported to create preferences for particular classes of creditors of insolvent national banks. *See Cook County National Bank v. United States,* 107 U.S. 445 (1883); *Davis v. Elmira Savings*

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[3]Indeed, statements recognizing the requirement of equal distribution among creditors abound in the reported cases. *See Texas & Pacific Ry. Co. v. Pottorff,* 291 U.S. 245, 255 (1934) (the National Bank Act is designed "to insure, in case of disaster, uniformity in the treatment of depositors and a ratable distribution of assets."); *Blakey v. Brinson,* 286 U.S. 254, 263 (1932) (a general creditor "is entitled only to share in the funds of the bank on an equal footing with other creditors who similarly are the victims of its insolvency."); *Atlantic Gypsum Co. v. Federal National Bank,* 76 F. 2d 59, 61 (1st Cir. 1935) (section 194 "is distinctly unfriendly to the recognition of . . . preferred claims."); *Uhl v. First Nat. Bank & Trust Co.,* 24 F. Supp. 275, 276 (W.D. Mich. 1935), *aff'd.,* 94 F. 2d 1013 (6th Cir.), *cert. denied,* 304 U.S. 584 (1938) ("The obvious purpose of . . . [12 U.S.C. §91] and of section 194 of the same title is to secure equality of distribution of the assets of an insolvent bank among its creditors."); *Irons v. Manufacturers' Nat. Bank* 17 Fed. 308, 311 (C.C.N.D. Ill. 1883) (the "manifest intention of the national banking act is a distribution of its assets, in case a bank becomes insolvent, equally among all the unsecured creditors.").

Bank, 161 U.S. 275 (1896). *See also Jennings v. U.S. Fidelity & Guaranty Co.*, 294 U.S. 216 (1935); *Loughman v. Town of Pelham*, 126 F. 2d 714 (2d Cir. 1942); *People ex rel. Barrett v. Union Bank & Trust Co.*, 362 Ill. 164, 199 N.E. 272 (1935).

In a recent decision dealing with the National Bank Act ("NBA"), *Third National Bank v. Impac Ltd., Inc.*, 432 U.S. 312 (1977), the Court noted that:

> . . . Congress has [via the provisions of the NBA] consistently and effectively sought to minimize the risk of insolvency for national banks, and to protect bank creditors from disparate treatment. [*Id.* at 323.]

With respect to the role played in this protection by 12 U.S.C. §91, the Court agreed with the Supreme Court of Tennessee, 541 S.W.2d 139, 141 (1976):

> . . . the federal state [§91] was intended "to secure the assets of a bank, whether solvent or insolvent, for ratable distribution among its general creditors . . . ." [*Id.* at 314-15.]

The principle of equal treatment was recognized and enforced by the FDIC prior to the USNB insolvency. *See* 12 C.F.R. §306.2. *See also* FDIC Annual Reports for 1950 at 12, 1953 at 8, 1967 at 20 and 1970 at 3. Prior to USNB, the agency never even suggested that 12 U.S.C. §1823(e) authorized it to accord different distributive shares to the creditors of an insolvent national bank. *See* FDIC Annual Reports for the period 1935-1973. In fact, the FDIC's current reliance on that statute did not occur until after the pleading stage of this litigation; in their answer to the second amended complaint defendants alleged that they acted "under

the authority and within the discretion vested in them by Title 12 U.S.C. §1823(d) and (e)." (R 370.)[4]

This case would only have warranted the Court's plenary consideration if the Court of Appeals had sanctioned the FDIC's departure from the rule of equal treatment. The holding below that the Receiver of USNB was bound to comply with that rule can hardly be said to represent "an important question of federal law which has not been, but should be, settled by this court." Sup. Ct. Rule 19(1)(b). The only forum that can grant the FDIC as Receiver the dispensation it seeks is the Congress which enacted the ratable distribution rule in 1864 and has adhered to it ever since.

2. Petitioner proffers essentially two reasons in support of its application for the writ. First, it refers to the alleged frequency with which the issue here presented arises. (Pet. 9.) Second, it contends that the Ninth Circuit's decision will adversely affect the agency's ability to deal with national bank insolvencies. (Pet. 9-10.) The only explanation offered in support

[4]We agree with that allegation. Because Crocker required additional capital in order to support its expanded branch structure and almost one billion dollars of new deposits, the FDIC in its corporate capacity made a $50 million capital loan to Crocker, evidenced by a capital note in that amount payable to the FDIC in five years, secured by USNB's assets retained by the Receiver. (Pet. 34a-35a.) That loan was necessarily made under §1823(e). But the loan by the FDIC in its corporate capacity to the Receiver in order to bring the asset and liability package purchased by Crocker into balance was made pursuant to 12 U.S.C. §1823(d), *See infra* at 14 n.8. *See also FDIC v. Godshall*, 558 F. 2d 220, 221 n.4 (4th Cir. 1977). The latter provision admonishes the Receiver that the "proceeds of every such sale or loan shall be utilized . . . in the same manner as other funds realized from the liquidation of the assets of such banks," *i.e.*, distributed ratably in conformity with the provisions of the NBA, specifically 12 U.S.C. §§192 and 194.

of the latter reason is the argument that because the FDIC desires to afford 100% protection to most creditors of an insolvent bank, the holding below that if some creditors receive a 100% distribution all similarly situated creditors must receive the same distributive share will expose the insurance fund to unacceptable risks. (Pet. 17-19.) Neither reason, however, survives analysis.

A. We have already noted that the discrimination issue never arose prior to the USNB insolvency because the FDIC as receiver never sought to make unequal distributions of an insolvent bank's assets. There is only one reported case of a receiver of an insolvent national bank even attempting to act in that fashion, *Ex parte Moore,* 6 F. 2d 905 (E.D.S.C. 1925), but the court held that such conduct was unlawful under 12 U.S.C. §194.[5]

The statistics set out in the petition concerning bank failures (Pet. 9-10) are meaningless. They do not distinguish between state and national bank failures,[6]

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[5]*Ex parte Moore* was, of course, decided prior to the passage of the Federal Deposit Insurance Act ("FDIA") and the creation of the FDIC. That fact is, however, irrelevant on the subject of the applicability of the NBA to the FDIC when it is acting as receiver of insolvent national banks. The distribution of the USNB assets acquired by the Receiver was not under the FDIA but, as petitioner itself recognized by seeking the District Court's approval pursuant to 12 U.S.C. §192, under the provisions of the NBA, including §194. *See In re Anjopa Paper & Board Mfg. Co.,* 269 F. Supp. 241, 252-53 (S.D.N.Y. 1967):

> [T]he mandatory appointment of FDIC as a receiver of an insured national bank (12 U.S.C. §1821(c)), subjects it to the provisions of the National Bank Act with regard to the liquidation and/or rehabilitation of insolvent banks (12 U.S.C. §191-197).

[6]Here we are dealing only with national banks and federal law. In state bank cases the conduct of the FDIC as receiver

or between cases involving FDIC assistance to weak, operating banks to facilitate purchase and assumption transactions prior to the appointment of a receiver and cases of actual insolvency.[7] Most striking is the fact that we are *not* told that any other pending case involves the issue of unequal distributive shares paid to creditors by the FDIC acting as receiver of an insolvent national bank.

B. The ratable dividend rule enforced by the Court of Appeals in and of itself has absolutely no impact on the FDIC's insurance fund. The petitioner's concern for its insurance fund arises not from the requirement of federal law that it treat all creditors equally, but

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is controlled by the requisites of state law. *See* 12 U.S.C. §1821(c). Of the sixty-one banks which the petition notes "closed" since 1970, only 11 were national banks. *See* FDIC Annual Reports for 1970, p. 3 (Table 1); 1971, p. 4 (Table C); 1972, p. 278 (Table 122); 1973, p. 7 (Table 3); 1974, p. 1 (Table 3); 1975, pp. 198-99 (Table 122); 1976, pp. 274-75 (Table 122); and 1977, p. 15. Thus in only 11 cases since 1970 could the requirements of §§91 and 194 of the NBA come into play. Only 7 of these involved purchases and assumptions. *Id.* Thus that is the *maximum* number of instances in which the interrelation between the NBA and §1823 of the FDIA could possibly be involved.

[7]The *total* number of national banks in which the FDIC has been appointed receiver through 1977 is 45, not the 101 cited in footnote 7 (at p. 9) of the petition. *See* FDIC Annual Reports for 1972, p. 279 (Table 123); 1973, p. 7 (Table 3); 1974, p. 7 (Table 3); 1975, pp. 198-99 (Table 122); 1976, pp. 274-75 (Table 122); and 1977, p. 15. Of these 45 only 9 have also involved purchases and assumptions. *Id.* Five of the 9 national bank receiverships resolved by purchases and assumptions involved banks of less than 7 million dollars in assets (in contrast to the 8 *billion* dollar FDIC insurance fund). Thus contrary to the impression created in the petition, there have not been "more than 500", or "Sixty-one banks [since 1970]" or "101 . . . national banks" (Pet. 9) to which the question at issue is conceivably relevant, but rather only 9 (7 since 1970) of which only *4* have been of significant size.

from its own predilection that most creditors of an insolvent bank receive a 100 cent on the dollar return.

All that the Ninth Circuit did was rule out discrimination. It did not circumscribe the discretion of the FDIC to opt for purchase and assumption transactions or seek to control the terms and conditions of any such arrangements. Moreover, it did not mandate 100% distributions. All that it required in future insolvencies resolved by purchase and assumption agreements was equal treatment of similarly situated creditors via whatever method the FDIC chooses. Thus the court's decision exposes the insurance fund to no greater or lesser risk than already exists by virtue of the $40,000 per deposit insurance limit. The fund's exposure in future insolvencies is, as it has always been, limited by the amount of the insured deposits.

What the FDIC did in the USNB insolvency was attempt to save the insurance fund millions of dollars at the expense of one group of creditors. There were approximately $1,165 million in assumable USNB liabilities (including $91 million in standby letters of credit) of which about $630 million were insured deposits. The saleable assets amounted to $855 million plus the premium bid plus the proceeds of the FDIC loan. The results of the bidding and loan transaction increased the asset package to approximately $1,075 million. (Pet. 6a-7a.) After paying insured deposits of about $630 million, there would have been $445 million in assets to pay off $535 million in liabilities. Under §194 everyone should have received a dividend of about 83%. Had that been the result in this case there would have been no litigation. What the FDIC did, however, was use the $91 million in assets raised

by USNB on its standby letters of credit to pay off all other creditors at a rate of 100%, giving the letter of credit holders nothing. That result is not justified by 12 U.S.C. §1823(e) or required in order for the FDIC to do purchase and assumption transactions. There is simply no reason why the FDIC should be free to discriminate against one class of creditors.

While respondents assumed the normal business risk that if USNB failed they might lose some of their investment (*e.g.* 17%), they never assumed the risk that in an insolvency the FDIC would single them out as the scapegoats and use their funds to pay off other creditors at full value while depriving them of any return. The FDIC does not, under either the NBA or FDIA, have the discretion to chose a sacrificial lamb who becomes, in effect, a co-insurer for the purpose of giving all other creditors a 100% dividend.

3. The Court of Appeals' reading of the applicable statutes is beyond reproach. Petitioner's entire case is premised on the contention that §1823(e) constitutes a "broad" grant of authority to the FDIC as *receiver* of insolvent national banks "to arrange purchase and assumption *transactions* 'upon such terms and conditions as it may determine.'" (Pet. 16; emphasis supplied.) As the appellate court pointed out (Pet. 22a-23a), the language of the statute is quite to the contrary —all it authorizes is *"loans"* (not transactions) by the *Corporation* to facilitate mergers or purchases and assumptions. It is only those loans which may be upon such terms and conditions as the Corporation determines.

4. Study of the legislative and administrative histories of §1823(e) yields not even a hint that it was intended to authorize the FDIC as receiver of insolvent national banks to discriminate in purchases and assumptions. Prior to USNB there were only 4 receiver-activated purchase and assumption transactions (Home National Bank of Ellenville, New York, 1956; First National Bank of Coalville, Utah, 1969; Skyline National Bank, Colorado, 1973; and First National Bank of Eldora, Iowa, 1973), and in each of those cases all creditors were treated equally.[8] Indeed all of the reported decisions which have upheld provisions of consolidated plans assisted by the FDIC pursuant to its §1823(e) powers involved purchase and assumption agreements between operating banks. None of those

[8]In such cases the agency petitioned the appropriate court for approval "pursuant to 12 U.S.C. §192 and 12 U.S.C. §1823(d) . . .", not §1823(e). *See, e.g.,* Petition for Sale of Assets and Order in *In the Matter of the First National Bank of Coalville,* No. 3979, Dist. Ct. 4th Judicial Dist., Summit Co., Utah (1969). In USNB the FDIC also relied upon §§192 and 1823(d). Such is not surprising in view of the fact that the agency and the Congress both viewed §1823(e) as applying only to the consolidation of failing banks with sound banks prior to a declaration of insolvency and the appointment of a receiver. *See, e.g.,* Hearings on H.R. 5357 (Banking Act of 1935), House Committee on Banking and Currency, 74th Cong. 1st Sess. 16, 146, 690 (1935); Hearings on H.R. 11844 (Extending Power of FDIC), House Committee on Banking and Currency, 74th Cong. 2d Sess. (1936); 80 Cong. Rec. 5574 (1936); 83 Cong. Rec. 7190-93, 8307 (1938). (During the 1938 House debate on the bill to make §1823(e) a permanent part of the FDIA, Representative Williams made a speech which petitioner quotes in part (Pet. 16-17) and wholly distorts. In his remarks Congressman Williams explained that §1823(e) was a pre-insolvency consolidation statute which gave the agency similar powers to those which it already had in the case of insolvent banks in the hands of receivers. We have reproduced the relevant portions of that speech in Appendix B to this brief.) *See also* FDIC Annual Report for 1944 at 9, 17-18.

decisions involved receivers or sanctioned unequal treatment of similarly situated creditors of insolvent national banks. *See Thomas P. Nichols & Son Co. v. National City Bank,* 313 Mass. 421, 48 N.E. 2d 49, *cert. denied* 320 U.S. 742 (1943);[9] *Lamberton v. FDIC,* 141 F. 2d 95 (3d Cir. 1944); *Brown v. New York Life Ins. Co.,* 152 F. 2d 246 (9th Cir. 1945); *FDIC v. Cloonan,* 165 Kan. 68, 193 P. 2d 656 (1948); *FDIC v. Rectenwall,* 97 F. Supp. 273 (N.D. Ind. 1951).

As Justice Frankfurter once noted, "[o]ne must also listen attentively to what it [a statute] does not say." Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum. L. Rev. 527, 536 (1947). Examination of §1823(e) in light of Justice Frankfurter's admonition demonstrates the utter futility of petitioner's position. No matter how §1823(e) is read, no matter what role it was intended to play, it is clear "it does not say" that the FDIC may discriminate among similarly situated creditors in structuring purchase and assumption transactions. There is not one word in §1823(e) which repeals, modifies or qualifies the existing provisions of the NBA dealing with the obligations of receivers when distributing the assets of insolvent banks. *Cf. Harmsen v. Smith,* 542 F. 2d 496, 501 (9th Cir. 1976). The FDIA deals with

[9]The *Nichols* case involved "a voluntary liquidation . . . when it [the selling bank] was not insolvent." 48 N.E. 2d at 50. Accordingly, there was no receiver involved nor any reason to consider the ratable treatment rule of §§91 and 194. Contrary to petitioner's assertion (Pet. 12-13 n.10), the *Nichols* court did not hold that §1823(e) overrode creditors' rights under the NBA. The court held only that under the particular circumstances of that case the inadvertently omitted creditor had no claim against the FDIC under the NBA, but was protected by the solvency of the selling bank.

everything except the distribution of the assets of an insolvent national bank. On that subject it admonishes the receiver to comply with existing law unless statutory authority to ignore the NBA is found. 12 U.S.C. §1821(d). There is no authority to ignore §194.

Conclusion.

For the foregoing reasons, we submit that the petition should be denied.

Dated: September 18, 1978.

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APPENDIX A.

12 U.S.C. §192 (in Relevant Part).

On becoming satisfied, as specified in sections 131 and 132 of this title, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct. Such receiver shall pay over all moneys so made to the Treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings. [Second paragraph omitted.]

APPENDIX B.

Speech of Representative Clyde Williams of Missouri Delivered on the Floor of the House of Representatives, May 20, 1938. 83 Cong. Rec. 7191-92.

* * *

Now we come to this amendment under consideration, which is short and comparatively unimportant but, in my view, beneficial and helpful. This bill simply establishes as a permanent policy that which has been temporary and, in a sense, experimental. It is not only a question of economy in the administration of the law but also a question of avoiding bank failures as far as possible. In the case of an insured bank in a serious or failing condition, this law permits the Federal Deposit Insurance Corporation to make loans to or purchase part of the assets of such bank in order to reduce the risk or avert a threatened loss to the Corporation.

At the close of the bank holiday many banks were anxious to open up as soon as possible and the people in the various communities were clamoring for banking facilities and accommodations. Under those conditions some banks that were not in a perfectly sound condition were permitted to resume operations. Some of them had old, slow, frozen, and depreciated assets. It was not long until they were in difficulty and it was to give them a chance to clean up and survive, if possible, that this legislation was passed as a temporary measure in 1935. It was tried out with some measure of success, and in 1936 the law was extended until July 1, 1938, in order to give more time to test its efficacy. The measure has proved a success and the Board now thinks it should be made permanent legislation. *The paragraph preceding the one which this bill seeks to amend gives the Corporation the authority to make loans on the assets or purchase and liquidate any part of the assets of a closed insured bank.* This is permanent legislation. *The proposal here is to give the same powers to the Corporation with reference to an insured bank that is still running but may be in difficulty* and there is a threatened loss to the Corporation by reason of bad assets in the bank. This provision permits the Corporation to lift from such a bank, *while it is still a going concern,* its bad assets either by a loan or by purchase and to liquidate those assets, while the good assets may be transferred to another insured bank. This will permit the liquidation of the bad assets and save the good assets from going through the wringer. Under this method only the bad assets are taken over by the Corporation and handled and adjusted by its liquidating agent, while the good assets pass to another bank, which is an insured and a sound and a safe institution, and which will carry on and furnish banking facilities for the community. . . . The experience which the Corporation has had under the operations of this provision proves that to be true. During the 2 years and 8 months this temporary provision has been in effect 101 insured banks have suspended and have been or are now being liquidated in full. The estimated loss to the Corporation is 24 percent of the insured deposits. During that same period 53 insured banks have received aid from the Corporation under the purchase and loan provisions now being considered, and the estimated loss to the Corporation in those cases is 21 percent of the insured deposits. The loss has not only been less, but 53 bank mergers have been effected, outright bank failures have been averted, and normal banking functions have

continued without interruption. It is interesting to know that while the total deposits in the 53 banks were substantially greater than those in the 101 banks the percentage of loss in the former was less than in the latter. It would seem that if this procedure can lessen the loss to the Corporation and also avert the disastrous consequences of a bank failure to a community it has demonstrated its usefulness and that the law should be made permanent. [Emphasis supplied.]

Service of the within and receipt of a copy thereof is hereby admitted this .... day of September, A.D. 1978.